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**IN THE  
COURT OF APPEALS OF INDIANA**

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SCOTT RIPPLE, M.D. and )  
MIDWEST MEDICAL MANAGEMENT, INC., )  
d/b/a HEALTHCHECK, )

Appellants-Defendants, )

vs. )

MARK DAY, )

Appellee-Plaintiff. )

No. 84A01-0605-CV-214

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APPEAL FROM THE VIGO SUPERIOR COURT  
The Honorable Philip Adler, Judge  
Cause No. 84D02-0509-CT-8176

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February 19, 2007

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BAKER, Judge**

Appellant-defendant Scott Ripple, M.D. and Midwest Medical Management, Inc., d/b/a Healthcheck (Healthcheck) (collectively referred to as the appellants), appeal from a \$900,000 judgment entered in favor of appellee-plaintiff Mark Day regarding his medical malpractice claim.<sup>1</sup> Specifically, Healthcheck argues that the judgment must be set aside because the trial court erred in excluding evidence of Day's methamphetamine use and drug treatment, that the trial court erred in denying Dr. Ripple's motion to strike allegedly inadmissible medical opinions of a registered nurse, and that the trial court erred in refusing to give a proposed instruction regarding proximate cause. Concluding that the exclusion of evidence regarding Day's prior drug usage was proper and finding no other error, we affirm the judgment of the trial court.

### FACTS

On April 16, 2002, Day was working the second shift as a train dispatcher in Terre Haute. At some point, his supervisor—Howard Neff—observed Day experiencing chest pain. Neff also noticed that Day's skin color was "very gray, ashen white." Tr. p. 270. Day acknowledged that the pain radiated up into his jaw and teeth and that he was having periods of shortness of breath. While Day did not see a physician at that time, Neff directed Day to see a doctor at the Healthcheck facility in Terre Haute the next day.

When Day arrived at Healthcheck, he was asked to complete a medical history form. Day wrote on the history form that he was fifty years old, smoked three packs of cigarettes a day, and took caffeine tablets. Day also indicated a history of diabetes and

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<sup>1</sup> Our Indiana Medical Malpractice Act limits the total amount recoverable for an injury or death of a patient to \$1,250,000 for malpractice after June 30, 1999. Ind. Code § 34-18-14-3.

high blood pressure. Healthcheck's receptionist noted that Day's primary complaint involved stomach pain. However, one of the attending nurses wrote that Day was complaining of "upper mid chest pain [and] head congestion." Pl. Ex. 2. The nurse also indicated that Day had an elevated blood pressure of 150/84.

Dr. Ripple examined Day and told him that he probably had not experienced a heart attack. However, Dr. Ripple did not inquire about Day's diabetes, smoking habit, or high blood pressure history. Also, while Dr. Ripple acknowledged that Day's problems were cardiac related, he did not order an EKG. Instead, Dr. Ripple prescribed Nexium for Day's alleged "stomach reflux," and diagnosed Day with gastroesophageal reflux disease. Tr. p. 1518; Pl. Ex. 2. The nurse at Healthcheck provided Day with written discharge instructions and signed a return to work form. The nurse also gave Day an informational sheet regarding heartburn.

On April 17, 2002, Day went to bed but woke up at approximately 2:00 a.m. in discomfort. Day took some Advil and acknowledged that his pain level was about the same as what he had experienced at work. Although Day was able to get back to sleep, he began to experience some stomach pain. Later that day, Day contacted Healthcheck, and its telephone record diary indicated "Patient had bad night—hard time breathing—could it be an allergic reaction?" Pl. Ex. 1. Day also spoke directly with Dr. Catherine Brown at Healthcheck. Her notes from the conversation were as follows:

Here yesterday—see note—took Nexium—went to bed 11 p.m.—awoke 1-2 a.m. with shortness of breath plus some chest pain. Took 4 Advil and went back to sleep for 1 hour—awoke again at 6 a.m. with shortness of breath and chest pain—went out for breakfast (drove by himself) and got his son off to school—still shortness of breath and anterior chest pain,

feeling sweaty talking easily on phone—increased stress—advised to go to ER by ambulance if feeling weak. C. Brown M.D.

Pl Ex. 2. After speaking with Dr. Brown, Day took another Nexium. Shortly thereafter, Day's pain increased. As a result, Day decided to drive to Regional Hospital's emergency room to obtain a second opinion. When Day arrived, he gestured to the receptionist, and she immediately asked Day if he was in pain. The staff began treating Day, and they informed him that he was experiencing a heart attack. The emergency room physician telephoned Dr. Brown and informed her of Day's status and that Day was being intubated.

Day was then transferred to a lab for an emergency catheterization, where it was determined that the heart attack had caused one of Day's heart muscles to rupture. There was also evidence that Day experienced coronary artery disease. Dr. Pradip Patel, the cardiologist on call at the hospital, was of the opinion that Day's disease was probably caused by a number of factors including heredity, elevated cholesterol, hypertension, diabetes, and abnormalities in the blood. Dr. Patel also indicated that if he had examined Day just prior to the heart attack, he would have performed a stress test and catheterization that could have prevented the myocardial infarction. Dr. Patel also noted that Day would still have required bypass surgery even if Day had been examined before his heart attack.

Thereafter, Day underwent triple bypass surgery and a valve replacement. Additional procedures were performed, and Day remained hospitalized for approximately forty-five days until he was discharged on May 31. Dr. Elias Dalloul became Day's

cardiologist on November 1, 2002. He was of the opinion that Day's heart valve would have to be replaced every ten to fifteen years, which would require open heart surgery.

Day subsequently initiated an action under the Indiana Medical Malpractice Act<sup>2</sup> by filing a proposed complaint with the Indiana Department of Insurance. Dr. Ripple submitted evidence to the Medical Review Panel (Panel) that Day had tested positive for methamphetamine on February 8, 2002, and had been required to participate in an employee assistance plan through work. Although the Panel considered this evidence, it concluded on July 18, 2005, that Dr. Ripple failed to comply with the appropriate standard of care as charged in the complaint, and that the conduct complained of was a factor in Day's condition.

Thereafter, on August 11, 2005, Day commenced an action against Dr. Ripple and Healthcheck in the trial court. The claim against Dr. Ripple was premised upon medical malpractice, and Healthcheck's liability was based on the theory of respondeat superior. In particular, Day asserted that Dr. Ripple was negligent in failing to order Day to go to an emergency room or cardiologist. Prior to trial, Day filed a motion in limine, seeking to prevent the appellants from offering any evidence concerning Day's illegal drug usage, including cocaine ingestion. Following a hearing, the trial court took the matter under advisement, and ultimately granted Day's motion with regard to his cocaine usage that had occurred more than ten years before his heart attack. Dr. Ripple raised no further objection as to this ruling.

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<sup>2</sup> I.C. § 34-18-1-1 et seq.

The trial court initially ruled that Day's positive methamphetamine test that occurred approximately seventy days prior to his heart attack "may have some probative value and therefore this evidence shall not be excluded." Appellants' App. p. 134-56. However, upon reconsideration of this ruling, the trial court determined that the prejudicial effects of such evidence greatly outweighed any probative value.<sup>3</sup> Therefore, the trial court issued an order excluding any evidence regarding Day's positive drug test or methamphetamine usage.

Also prior to trial, the appellants filed a motion to strike the testimony of registered nurse Laura Lampton, who was also a certified Nurse Lifecare Planner. Day had retained Lampton for the purposes of estimating future medical expenses that resulted from the heart attack. Lampton was also asked to determine the value of medical expenses that had already been incurred. Lampton based her opinions on the deposition testimony of Dr. Patel and conversations that she had with Dr. Dalloul in determining the medical care that was required following Day's heart attack. The trial court denied the motion to strike, noting that Lampton was permitted to rely on other experts' opinions with regard to this issue.

Following the presentation of evidence at a jury trial that commenced on April 17, 2006, Dr. Ripple tendered the following jury instruction:

If you find from a full preponderance of the evidence that Plaintiff would have sustained his injuries or damages regardless of the type or mode of diagnostic tests, care or treatment conducted by the defendant physician,

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<sup>3</sup> In its ruling, the trial court observed that Vigo County had the highest level of methamphetamine use in the State and that the evidence regarding Day's use of the drug would be too inflammatory for the jury. Appellants' App. p. 192-95.

then your verdict should be for the defendant. In other words, if nothing a particular defendant did nor did not do caused Mark Day's claimed injury, you should find for the defendant.

Appellants' App. p. 513. The trial court refused to give the proposed instruction, and gave the Indiana Pattern Jury Instruction regarding proximate cause. Following the trial's conclusion on April 22, 2006, the jury returned a verdict for Day in the amount of \$900,000. Dr. Ripple and Healthcheck now appeal.

## DISCUSSION AND DECISION

### I. Evidence of Drug Use

The appellants first contend that the trial court erred in excluding evidence of Day's prior methamphetamine usage. Specifically, the appellants claim that this evidence should have been admitted because it was probative and relevant to the issue of proximate cause and the defense of contributory negligence.

In resolving this issue, we first note that the admission or exclusion of evidence is a determination that is entrusted to the trial court's discretion, and we will only reverse the trial court's decision when there is an abuse of discretion. Lee v. Hamilton, 841 N.E.2d 223, 227 (Ind. Ct. App. 2006). An abuse of discretion occurs if the trial court's action is clearly erroneous and against the logic and effect of the facts and circumstances before the court. Id. A trial court may also abuse its discretion if its decision is without reason or is based upon impermissible considerations. Id. However, erroneously excluded evidence requires reversal only if the error is inconsistent with substantial justice. Id. When the trial court excludes evidence, we ask whether the exclusion was proper. State

Dep't of Transp. v. Hoffman, 721 N.E.2d 356, 358 (Ind. Ct. App. 1999). If any valid reason supports the exclusion of the evidence, there is no reversible error. Id.

Indiana Rules of Evidence 402 and 403 govern the admissibility and exclusion of evidence when the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. Evidence Rule 402 provides:

All relevant evidence is admissible, except as otherwise provided by the United States or Indiana constitutions, by statute not in conflict with these rules, by these rules or by other rules applicable in the courts of this State. Evidence which is not relevant is not admissible.

Evidence Rule 403 states:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence.

In this case, the appellants claim that the evidence regarding Day's methamphetamine use should have been admitted to establish that he was contributorily negligent in causing his heart attack. However, in order to bar recovery, contributory negligence must be a proximate cause of the injury. In other words, proximate cause "must unite in producing the injury, and thus be simultaneous and cooperating with the fault of the defendant." Cavens v. Zaberdac, 849 N.E.2d 526, 531 (Ind. 2006).

Indiana Pattern Jury Instruction 23.17, which was given to the jury in this case, provides:

The patient has a duty to exercise reasonable care in providing a [health care provider] with accurate and complete information. If the [health care provider] has proved by a preponderance of the evidence each of the following:



- (1) The plaintiff failed to provide accurate and complete information to the [health care provider];
- (2) A reasonably prudent person in the same or similar circumstances would have provided accurate and complete information to the [health care provider]; and
- (3) The plaintiff's failure to provide accurate and complete information to the [health care provider] proximately caused plaintiff's [death] [injury];

Then your verdict should be for the [health care provider].<sup>4</sup>

The comment to this instruction cites Fall v. White, 449 N.E.2d 628 (Ind. Ct. App. 1983), which is relevant in evaluating the type of conduct by a patient that constitutes contributory negligence when failing to provide accurate and complete information to a health care provider. In Fall, we observed:

[A] patient does not have a duty to diagnose his own condition as he can reasonably expect the physician to ask the proper questions. However, we disagree with Fall's contention that the court's instructions commanded the jury to find Max contributorily negligent if he failed to spontaneously advise his physician of his complete medical background. Rather, the instruction in question required only that a patient has a duty to exercise reasonable care in providing medical information and the jury was further instructed that Max's standard of conduct was that of a reasonably prudent person under like or similar circumstances. These instructions conform to the rule of contributory negligence in medical malpractice actions set out by our supreme court in Memorial Hospital of South Bend, Inc. v. Scott, (1973) 261 Ind. 27, 300 N.E.2d 50.

449 N.E.2d 628, 634 (Ind. Ct. App. 1983). We further noted:

[The] failure to disclose could, under certain factual circumstances, preclude a finding of negligence on the part of the doctor. Amdur v. Zim

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<sup>4</sup> The instruction that was actually given at trial referenced Dr. Ripple as the defendant, and April 17, 2002, was listed as the date on which Day was to have provided the information to Dr. Ripple. Appellants' App. p. 533.

Israel Navigation Co., (S.D.N.Y.1969), 310 F.Supp. 1033; Tangora v. Matanky, (1974) 231 Cal.App.2d 468, 42 Cal.Rptr. 348; Johnson v. St. Paul Mercury Insurance Co., (1969) La.App., 219 So.2d 524, 36 A.L.R.3d 1349. In Johnson, for example, a hospital doctor was called upon to treat a 2 1/2 year old child who, some nineteen hours earlier, had ingested aspirin. This latter fact was not revealed to the doctor by the child's parents although the father was asked specifically by the doctor whether the child had taken any aspirin, cough syrup or any other medication before he was brought to the hospital. Consequently, the doctor did not administer a test to determine the presence of aspirin and proceeded to diagnose and treat the illness as a typical case of croup.

Id. at 635 n.5.

The language quoted above makes it clear that a plaintiff has a duty to provide accurate and complete information to the health care provider when the provider seeks to illicit particular health information. Here, however, there is no evidence that Day was ever asked about either past or current illicit drug use by Dr. Ripple or other Healthcheck personnel. It is also uncontroverted that there was no evidence that Day had used any illicit drugs after his failed urine test that was randomly conducted in February 2002. Appellants' App. p. 82.

Although Dr. Ripple asserted that the long-term use of illicit drugs builds up plaque that results in occlusions to the cardiac arteries, there was no evidence that Day ever engaged in the chronic use of illicit drugs. To the contrary, the evidence showed that from approximately 1990 to 1992, Day had periodically used cocaine and that in February 2002, he used methamphetamine while drinking alcohol. Id. at 82, 420-35, 445-54. However, Dr. Ripple's own expert cardiologist testified that there is no way of determining which particular cause creates plaque that forms occlusions in a particular individual. In any event, it is not relevant whether Day's occlusions were due to diet,

heredity, or lifestyle. Rather, the central issue was why Dr. Ripple failed to refer Day to the emergency room or a cardiologist when Day reported symptoms that Dr. Ripple admitted he believed could be cardiac related. For these reasons, we conclude that the trial court did not abuse its discretion in excluding evidence of Day's prior drug use.

## II. Motion to Strike

The appellants next contend that the trial court erred in denying their motion to strike the opinions of registered nurse Laura Lampton that were contained in Day's life-care plan. Specifically, the appellants argue that Lampton's opinions were inadmissible on the issues of causation and damages because she was not a physician.

A trial court's decision regarding the admissibility of expert testimony lies solely within its discretion, and we will reverse only when there is an abuse of discretion. Lytle v. Ford Motor Co., 814 N.E.2d 301, 308 (Ind. Ct. App. 2004). An abuse of discretion occurs when the trial court's decision is clearly against the logic and effect of the facts and circumstances before it. Carnahan v. State, 681 N.E.2d 1164, 1166 (Ind. Ct. App. 1997).

Indiana Evidence Rule 702 governs the admissibility of testimony by experts:

(a) If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

(b) Expert scientific testimony is admissible only if the court is satisfied that the scientific principles upon which the expert testimony rests are reliable.

Additionally, Evidence Rule 703 describes the facts or data upon which an expert may base an opinion:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. Experts may testify to opinions based on inadmissible evidence, provided that it is of the type reasonably relied upon by experts in the field.

In general, Indiana Evidence Rule 703 permits an expert to rely upon facts not before the jury in rendering an opinion if it is the type reasonably relied upon by experts in the field.

In Schmidt v. State, this court made the following comments regarding the types of court information that is permitted to be used by the expert in rendering an opinion. Quoting Judge Robert Miller, Jr., we observed:

[E]arlier Indiana cases, and other courts governed by Rule 703, generally have found the following sorts of information to be reasonably relied upon by experts in various fields: hospital records, laboratory reports, X-rays, and doctors' medical records relied on by medical professionals; reports by subordinates relied upon by superiors; discussions with other experts in the expert's field; mental hospital records reports by clinical psychologists and social workers, and police reports relied upon by psychiatrists or forensic psychologists; a report from an engineering firm relied upon by an engineer; an autopsy report relied upon by a pathologist; business records relied upon by an expert in the business field; and state agency records relied upon by a law enforcement officer.

Courts have shown considerable reluctance to find reasonable reliance on information not prepared by persons with specialized training, such as lay witness statements, anonymous reports, statements by a party, and data prepared in anticipation of litigation.

816 N.E.2d 925, 938-39 (Ind. Ct. App. 2004) (quoting 13 ROBERT LOWELL MILLER, JR., INDIANA PRACTICE, INDIANA EVIDENCE § 703.107, 427-30 (footnotes omitted)). We also observed in Schmidt that “the rule allowing an expert’s reliance on

hearsay cannot be employed simply as a conduit for placing . . . another person's statement before the jury." *Id.* at 939 (quoting 13 ROBERT LOWELL MILLER, JR., INDIANA PRACTICE, INDIANA EVIDENCE § 703.109, 437).

In this case, Dr. Ripple deposed Lampton and learned of her qualifications. *Tr.* p. 1176-79. Dr. Ripple also knew that Lampton had reviewed Dr. Patel's deposition and that she had consulted with Dr. Dalloul to obtain their opinions in determining the extent of Day's medical care that had been caused by the heart attack. Appellants' App. p. 303-20. Lampton testified that she had formed her opinion on the basis of reading the deposition and speaking with Dr. Dalloul. *Id.* at 320. Lampton also acknowledged that she customarily spoke with physicians before she prepares a life care plan. *Id.*

Before ruling on the motion, the trial court challenged Dr. Ripple's counsel as to why Lampton was not permitted to rely on the physicians' opinions. Counsel replied that he was relying on the provisions of Evidence Rule 702 in challenging Lampton as unqualified to render an opinion regarding medical causation. However, as quoted above, it is actually Evidence Rule 703 applies, as Lampton is simply relying on the physicians' opinions to determine what medical care was incurred as the result of Day's heart attack. Three physicians testified before Lampton and identified Day's medical care that was caused by the heart attack and the resulting future medical care that Day would require. Indeed, the appellants never challenged Lampton's expertise in valuing medical care, and Lampton determined the value of past and future medical care by relying on the medical doctors' testimony. As a result, we conclude that there was no

error in the trial court's admission of this evidence, and the appellants' motion to strike was properly denied.

### III. Refused Instruction

Finally, the appellants argue that the trial court erred in refusing to give Dr. Ripple's proposed instruction on proximate cause. Specifically, the appellants maintain that the instruction should have been given because it was a correct statement of the law and this court approved the giving of a similar instruction in Fall v. White.

We initially observe that the giving of jury instructions is a duty entrusted to the trial court's discretion. Dughaish ex rel. Dughaish v. Cobb, 729 N.E.2d 159, 163 (Ind. Ct. App. 2000). We will reverse the trial court's refusal to give a tendered instruction when: 1) the instruction is a correct statement of the law; 2) it is supported by the evidence; 3) it does not repeat material adequately covered by other instructions; and 4) the substantial rights of the tendering party would be prejudiced by the failure to give the instruction. Id.

In deciding whether the appellants' instruction regarding proximate cause was properly refused in this case, we note that this issue was decided adversely to them by our Supreme Court in Cavens, 849 N.E.2d at 526, in an instance where a substantially similar instruction to the one tendered here had been refused. In Cavens, the administrator of the patient's estate commenced a medical malpractice against Dr. Cavens and others. The matter proceeded to trial, and Dr. Cavens asserted the patient's contributory negligence as an affirmative defense. At trial, he offered the following instruction:

If you find from a fair preponderance of the evidence that [the patient's] injuries and damages would have occurred regardless of the type of treatment rendered by [the defendant physician] in this case, then your verdict should be for the defendant.

Id. at 533. In affirming the trial court's refusal to give the instruction, the Cavens court observed that the proffered instruction was sufficiently covered in substance by the other final instructions that were given. Specifically, it was determined that "[t]hese final instructions informed the jury that, for the plaintiff to recover, a preponderance of the evidence must prove that [the patient's] death was caused by the negligence of the defendant, and that the mere fact that she died is insufficient." Id. at 534.

In this case, the trial court's final instructions specifically and accurately defined "proximate cause" for the jury. Appellant's App. p. 523. Additionally, one of the other instructions provided:

In order to recover on a cause of action for medical malpractice, the Plaintiff has the burden of proving the following propositions by a preponderance of the evidence:

- (1) That the Defendants owed the Plaintiff a duty;
- (2) That the Defendants breached that duty by permitting their conduct to fall below the applicable standard of care; and
- (3) That said breach of duty proximately caused the Plaintiff to suffer a compensable injury.

As I stated, the Plaintiff must prove these propositions; the Defendants have no burden of disproving them. If you find in this case that the Plaintiff has failed to prove by a preponderance of the evidence any one of these propositions, then you should find for the Defendants as to this cause of action against them.

Id. at 525. Another instruction stated:

Physicians are allowed wide range in exercising their judgment and discretion. They are not limited to the most generally used methods of treatment.

When other approved methods of treatment are available, the physician must exercise sound judgment in choosing the treatment. If a physician exercises sound judgment in selecting from a variety of approved treatments and uses ordinary care and skill in treating a patient, then the physician is not responsible for the treatment's lack of success.

The fact that other methods existed or that another physician would have used a different treatment does not establish malpractice.

Id. at 530. Finally, the jury was instructed:

If you find from a preponderance of all the evidence that the Defendants are liable to the Plaintiff and that Plaintiff has suffered damages, then you must decide the amount of money that will fairly compensate Plaintiff for each proven element of damage.

In deciding these damages, you may consider the following:

1. The nature and extent of the injuries and the effect of the injuries on the Plaintiff's ability to function as a whole person.
2. Whether the injuries are temporary or permanent.
3. The physical pain and mental suffering experienced to the present and to be experienced in the future due to the injuries.
4. The value of the lost earnings and lost or impairment of earning capacity.
5. The reasonable expense of necessary medical care, treatment and services, and the reasonable expense of future medical care, treatment and services.
6. Disfigurement resulting from the injuries.

Your decision must be based on the evidence relating to damage and not on guess or speculation.

Id. at 536. In examining these instructions, we note that they are substantially similar to those that were given in Cavens. See Cavens, 849 N.E.2d at 533-34. As a result, we



decline to find that the trial court abused its discretion in refusing to give the appellants' tendered instruction under these circumstances.

The judgment of the trial court is affirmed.

DARDEN, J., and ROBB, J., concur.